In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 327

HOWARD ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1963. The petition was filed on August 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient competent evidence to sustain the jury verdict.

2. Whether there was improper and prejudicial cross-examination of defendant which required reversal of his conviction.

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3. Whether the transcript was improperly corrected pending appeal.

STATEMENT

Petitioner was convicted, after trial by jury, of having unlawfully caused the mails to be used to send a confirmation of purchase of 100 shares of stock in Mark, Inc. to one William S. Mueller in pursuance of a scheme and artifice to defraud, in violation of 15 U.S.C. 77q(a) and 77x. He was sentenced to imprisonment for one year.[1]

Petitioner was employed as a telephone salesman by Kimball Securities, Inc., a "boiler room operation" (R. 2952–2953)[2] which sold shares only in Mark, Inc., its predecessor and successor (R. 2955, 2957, 3231). Kimball's method of sale was to purchase mailing lists and send out "teasers", *i.e.*, descriptive literature intended to arouse the recipient's interest (R. 2959–2960). Those who responded were then called by the telephone salesmen who attempted to make sales of the stock (R. 2964). There were two types of salesmen: the "opener," who made the initial sale, and the "loader," who, after more "teaser" literature was sent, attempted to increase the sales to each buyer (R. 2965). Petitioner was employed as an "opener."

The salesmen, who needed no training because they had all worked elsewhere (R. 2971), received as

[1] Two other counts, one charging another unlawful use of the mails and one charging a conspiracy, were dismissed by the court at the close of the Government's case (R. 3356, 3365).

[2] R. indicates the pencil numbering from the court of appeals record.

commission at first 10% and later 12% of their gross sales to customers (R. 2967, 3228, 3230). The commissions of each salesman were computed by assigning him a number, which was indicated on the confirmation slip sent to the purchaser (R. 2966, 3228). The bookkeeper kept a list of the salesmen's numbers, and received copies of the confirmation slips from which he computed commissions (R. 3229).

Mueller, the victim, testified that he was called at home by a person who "identified himself as a Mr. Ross representing Kimball Securities at New York City" (R. 3092),[3] and that because of the solicitation he bought 100 shares of Mark at $2.35 a share (R. 3096). He stated that his caller told him that Mark was a good speculation, that Kimball was a reliable company that had hired stock analysts to protect customers (R. 3094), and that he (the caller) would put all of the money he could obtain into the stock (R. 3095). In point of fact, Kimball had no research department and no analysts, and the salesmen were never told that the company had earnings and were never shown a profit and loss statement (R. 2976–2978). The confirmation slip that Mueller received indicated the salesman as number "24" (R. 3327).[4]

[3] An S.E.C. questionnaire signed by Mueller indicated that a Joe Kimball had made the initial call. The discrepancy was explained by Mueller and probed fully on cross-examination. Mueller reiterated that the name of his caller was Ross (R. 3099, 3115).

[4] A Walter A. Gairing also testified that he had bought stock in Mark on the basis of a call from a man who identified himself as "Ross" (R. 3317), and the confirmation slip that he received also contained the number "24" in the salesman's space (R. 3327). Telephone company records showed that a

Joseph A. Kelly, a Securities and Exchange Commission investigator, testified that he had asked the Kimball bookkeeper for the list of salesmen, and that the bookkeeper had pointed to a list at the side of the cashier's cage which showed the salesmen by name and number (R. 3272). He testified that petitioner's name was listed next to the number "24" (R. 3274). Kimball's books reflected both commissions to petitioner and the sale to Mueller (R. 3221–3222). During the Government's case, petitioner's attorney conceded that petitioner had worked as a salesman and received commissions, but did not concede that he had made the particular sale at issue (R. 3224–3226).

Petitioner himself testified that he worked for Kimball between November 14 and December 1, 1958 (the period during which the sale to Mueller had been made) and earned between $700 and $800 in commissions (R. 3389, 3391). He stated that he had made a number of telephone calls in connection with his work, but had no specific recollection of having placed the call to Mueller, saying that he might or might not have done it (R. 3387–3388).

The gist of petitioner's testimony was that he had acted in good faith, that when he commenced his employment he had been given literature concerning Mark and thought that it was a good company (R. 3381–3383). On cross-examination, he was questioned concerning his past employment with other dealers

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man named "Ross" had made a call to Gairing from the telephone number listed to Kimball on the day that Gairing said he received his call (R. 3307–3308).

which, like Kimball, had sold stocks in only one company by telephone, and was asked the present status of those dealers and the companies whose stock he had sold (R. 3410–3434, 3512–3514, 3521–3522). One of the questions on cross-examination was whether petitioner had sold stock in Swan-Finch, which he denied. He did admit selling stock in Havana Racing (R. 3424). Thereafter, in the course of questioning petitioner about whether various companies were still in business, the prosecuting attorney made a remark which the original transcript reflected as: "I won't ask you about Swan-Finch now." Petitioner's attorney made no objection nor request in connection with this remark, but merely stated: "I don't understand that comment, your Honor." The Court said, "Evidently you have not read the newspapers" (R. 3432–3433). Thereafter, the Government, contending that the transcript was in error, moved to correct it by substituting the words "Havana Racing" for "Swan-Finch." The motion was supported by the affidavits of the prosecuting attorney and court reporter (R. 3658–3665), and was answered by an affidavit (R. 3667–3677) that included the affidavit of petitioner's trial counsel (R. 3674–3676). The trial judge, upon the basis of his own recollection and the context provided by his own comments as shown in the transcript,[5] issued an order granting the Government's motion (R. 3666).

[5] The trial was conducted from October 29th to November 2, 1962.

ARGUMENT

1. Even without Investigator Kelly's testimony in regard to the list, there was sufficient evidence linking petitioner to the sale to Mueller to sustain the verdict of guilty. The evidence was clear that petitioner had made the type of call that Mueller received, and petitioner himself conceded that he could have made the call in question.[6] The number listed in the salesman identification space on the confirmation slip that Mueller received was the same number that was listed on the confirmation slip received by Gairing, who also testified that he was solicited by petitioner, and petitioner's call to Gairing was corroborated by telephone company records. Although further corroboration might have been necessary had the question at issue been the broad one of whether petitioner had any connection with the Kimball operation, the corroboration is sufficient where his connection was conceded and the question at issue was only the narrow one of whether he made the particular call. Compare *United States* v. *Fleming*, 134 F. 2d 776, 778 (C.A. 2, 1943); *Jarvis* v. *United States*, 90 F. 2d 243, 245 (C.A. 1, 1937), certiorari denied, 302 U.S. 705; *Andrews* v. *United States*, 78 F. 2d 274,

[6] The question is whether there was sufficient evidence at the close of the entire case, and not at the close of the government's case, since by putting on a defense petitioner abandoned the motion that he made at the close of the government's case. *T'Kach* v. *United States*, 242 F. 2d 937, 938 (C.A. 5, 1957); *Leeby* v. *United States*, 192 F. 2d 331, 333 (C.A. 8, 1951); *Gaunt* v. *United States*, 184 F. 2d 284, 290 (C.A. 1, 1959), certiorari denied, 340 U.S. 917; *Mosca* v. *United States*, 174 F. 2d 448, 450–451 (C.A. 9, 1949); *United States* v. *Goldstein*, 168 F. 2d 666, 669–670 (C.A. 2, 1948).

275 (C.A. 10, 1935); *Van Riper* v. *United States,* 13 F. 2d 961, 968 (C.A. 2, 1926), certiorari denied *sub nom. Ackerson* v. *United States,* 273 U.S. 702; *Robilio* v. *United States,* 291 Fed. 975, 982–983 (C.A. 6, 1923), certiorari denied, 263 U.S. 716; *Wallace* v. *United States,* 291 Fed. 972, 973 (C.A. 6, 1923). Since there was thus sufficient competent evidence to sustain the verdict, it is immaterial that incompetent evidence on the point may have been admitted as well. *Leeby* v. *United States, supra,* 192 F. 2d at 335; *Diehl* v. *United States,* 98 F. 2d 545, 548 (C.A. 8, 1938).

Moreover, it is not entirely clear that Kelly's testimony was incompetent. His testimony and that of the bookkeper indicated that he was testifying to personal observation of a record kept in the normal course of business for the purpose of computing the salesmen's commissions; the testimony was therefore within a well-established exception to the hearsay rule. Nor is the best evidence rule applicable, since that rule comes into play only when it is the *terms* of a document, and not merely the *information* that it contains, that must be proved. *United States* v. *White,* 223 F. 2d 674, 675 (C.A. 2, 1955), certiorari denied, 350 U.S. 888; *Meyers* v. *United States,* 171 F. 2d 800, 812 (C.A. D.C., 1948), certiorari denied, 336 U.S. 912; *Herzig* v. *Swift & Co.,* 146 F. 2d 444, 446 (C.A. 2, 1945); *Maier* v. *Publicker Commercial Alcohol Co.,* 62 F. Supp. 161, 167 (E.D. Pa., 1945), affirmed on the opinion of the district court, 154 F. 2d 1020 (C.A. 3, 1946); 4 Wigmore, *Evidence* (3d Ed. 1940) §§ 1174(1), 1181.

2. The main thrust of petitioner's defense was good faith, *i.e.*, that he relied on the descriptive literature concerning Mark as much as did the persons to whom he sold, and hence that he had no knowledge that the stock issue was fraudulent and no intent to defraud his customers. It was therefore proper for the government to explore, on cross-examination, his prior connections with similar ventures to show a continuing course of conduct on his part, and to demonstrate that he must, from his previous experience, have been aware of Kimball's and Mark's lack of bona fides. *Sachs* v. *United States*, 281 F. 2d 189 (C.A. 9, 1960), certiorari denied, 364 U.S. 909; *Morrison* v. *United States*, 270 F. 2d 1, 4–5 (C.A. 4, 1959), certiorari denied, 361 U.S. 894; *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 650 (C.A. 8, 1957), certiorari denied, 354 U.S. 923; *Moses* v. *United States*, 297 F. 2d 621, 623–624 (C.A. 8, 1961); *Tandberg-Hanssen* v. *United States*, 284 F. 2d 331, 333 (C.A. 10, 1960); *Ehrlich* v. *United States*, 238 F. 2d 481, 484 (C.A. 5, 1956).

3. As to the putative statement in regard to Swan-Finch, it is sufficient to point out that, even if made, standing by itself it could hardly be considered so prejudicial as to require a new trial. Petitioner neither entered an objection nor requested a mistrial or a cautionary instruction. Compare *Century Indemnity Co.* v. *Arnold*, 153 F. 2d 531, 533 (C.A. 2, 1946), certiorari denied, 328 U.S. 854. Moreover, the question of correcting the record was properly submitted to the judge who presided at the trial, *Cox* v. *United States*, 284 F. 2d 704, 710 (C.A. 8, 1960),

certiorari denied, 365 U.S. 863; *William Howard Hay Foundation* v. *Safety Harbor Sanatorium*, 141 F. 2d 952 (C.A. 5, 1944); *Belt* v. *Holton*, 197 F. 2d 579, 581 (C.A. D.C., 1952); *Century Indemnity Co.* v. *Arnold, supra*, and he could properly make the correction either on his own recollection, *Marron* v. *Atlantic Refining Co.*, 176 F. 2d 313, 315 (C.A. 3, 1949), certiorari denied, 339 U.S. 923, or, as here, on recollection and affidavits from the parties. See *Cox* v. *United States, supra; Boucher Inventions* v. *Sola Electric Co.*, 1 F.R.D. 631 (D. D.C. 1941). The trial judge's ruling is final and conclusive on appeal, *Cox* v. *United States, supra*, p. 711, in the absence of a charge that he deliberately and intentionally falsified the record. *Belt* v. *Holton, supra*, p. 582.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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